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In the Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 455, 456

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, A CORPORATION

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled causes on August 25, 1947.

OPINIONS BELOW

The Tax Court and the Circuit Court of Appeals each rendered one opinion, covering both cases.[1] The memorandum opinion of the Tax Court is not reported (R. 103–109), and the opinion of the

[1] The records in these cases are in many material respects identical. Hence, to avoid duplication, all record references, *infra*, will be made to the record in case No. 455, unless otherwise specifically indicated.

Circuit Court of Appeals (R. 132–137) is reported in 163 F. 2d 531.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on August 25, 1947. (No. 455, R. 138; No. 456, R. 65) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under the provisions of Title VII of the Revenue Act of 1936 and the governing Treasury Regulations, where a processor has not borne the burden of the tax or has transferred it to other persons, the right to sue for refund is given to the persons who actually bore the burden of the tax.

2. Whether, within the meaning of the Revenue Act of 1936 and the governing Treasury Regulations, the relationship of taxpayer to its producer-members is that of trustee and beneficiaries.

3. Whether, within the meaning of the Revenue Act of 1936, and in particular, of Title VII, and the governing Treasury Regulations, Congress intended to confer the additional privilege upon processor corporations operating on a cooperative basis to obtain refund even though the processing tax burden has been shifted from processor to producers, while denying it to all other corporations.

4. Whether, under the Revenue Act of 1936, and the contracts between the parties, taxpayer shifted its tax burden to the producers in their capacity as producers and not as beneficiaries under an alleged trust.

5. Whether taxpayer bore the burden of the processing taxes paid by it for which it seeks refund.

6. Whether, if taxpayer is permitted to recover on the theory that it is a fiduciary for the producers, its refund claims are sufficient, within the meaning of the Revenue Act of 1936 and the governing Treasury Regulations.

7. Whether, in any event, the claim for refund of the processing taxes paid on jute involved in case No. 456 is sufficient to permit recovery, within the provisions of the Revenue Act of 1936 and the governing Treasury Regulations.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are printed in the Appendix, *infra*, pp. 27–40.

STATEMENT

Taxpayer seeks refunds in the amount of $7,903,615, of taxes imposed by the Agricultural Adjustment Act of 1933, as amended, upon the processing of sugar,[2] and in the amount of $4,818,

[2] In case No. 455. (R. 109–110.)

of taxes similarly imposed upon the processing of jute.[3] The cases were consolidated for hearing and decision (but not for judgment) in the Tax Court (R. 103), and in the court below (R. 132), since, as both tribunals noted, the legal principles involved in the two cases are the same (R. 103; 132). The principal factual difference here material is that in case No. 455 refund is sought of the taxes imposed on the processing of raw sugar, almost all of which was procured by taxpayer from its stockholder-producers (R. 103–104), and in case No. 456 refund is sought of the taxes imposed on the processing of jute made into bags to contain the refined sugar (R. 104). In both cases the actual processing taxes on the books of taxpayer were paid and the amount paid recovered by taxpayer in exactly the same way from its stockholder-producers (R. 104). After invalidation of the processing tax provisions of the Agricultural Adjustment Act, as amended, taxpayer filed separate claims for refund, in the respective amounts of $7,903,615 (No. 455, R. 18–98), and $4,818 (No. 456, R. 14–26). Each claim was rejected by the Commissioner on the ground that the evidence submitted with it did not show that taxpayer had borne the burden of the tax for which refund was sought. (No. 455, R. 99–100;

[3] In case No. 456. (R. 37–38.)

No. 456, R. 27–28.) Thereupon taxpayer filed separate petitions with the Tax Court for review of the Commissioner's disallowance of these claims. (No. 455, R. 3–17; No. 456, R. 3–13.) There was attached to each petition and incorporated by reference a copy of each of the refund claims and of the contracts and other evidence which had been submitted with it. (No. 455, R. 4; No. 456, R. 4.)

The Commissioner then filed identical motions in both cases in the Tax Court to dismiss the proceedings on the grounds that the respective petitions and their attached exhibits (1) failed to set forth a cause of action for refund of any part of the processing tax; (2) on their face showed that taxpayer bore none of the burden of the tax; and (3) failed to show that the financial benefits realized by taxpayer under its contracts with its stockholder members were in any way adversely affected or decreased because of the payment by taxpayer of the processing taxes. (R. 101–103.)

The Tax Court found that the petitions and their attached exhibits, upon which the Commissioner relied to support his motions, disclosed the following essential facts:

Taxpayer is a private business corporation incorporated under the laws of California and is engaged in the refining of raw sugar and in the

marketing of refined and raw sugar.[4] (R. 104.) The equitable title to its capital stock is in thirty separate corporate producer-plantations located in Hawaii; the legal title being in six trustees. These same producer-plantations are also represented by six corporate factors or agents with offices in San Francisco and Hawaii. The method of business operation between taxpayer and the producer-plantations during the period involved is set forth in detail in the contracts attached to the petitions as exhibits. In these contracts taxpayer referred to itself as the "buyer" and the factors representing the plantation-producers were referred to as "sellers," and they provided for the purchase by taxpayer of practically all the raw sugar produced by the plantations. (R. 104.) Taxpayer agreed to pay for the raw sugar 75%

[4] Taxpayer's petition admits that it "is a corporation organized and existing under and by virtue of the laws of the State of California" (R. 3); and that it (R. 8–9)—

> (8) * * * is a corporation created under the General Corporation Laws of the State of California.
>
> (9) Throughout the periods here involved petitioner was organized and operated on a cooperative basis, marketing the product of its members, who were also its stockholders, in approximately the same relative proportions as they produced the product for marketing, and turning back to them according to the quantity and quality of such products furnished by them in the gross proceeds of sales of the product furnished and all other income less necessary marketing expenses, a nominal fixed dividend on its capital stock and reasonable reserves for necessary purposes.

of its market value, depending upon its quality, shortly after its delivery in California. Subsequently taxpayer paid, out of its general operating funds, the entire expense of marketing the raw sugar or of processing and marketing it, depending upon conditions. Taxpayer also paid all taxes, governmental charges, insurance premiums, attorneys' fees, and trustees' fees. (R. 104–105.)

At the end of each fiscal year (November 30th), taxpayer accounted to the producers for the amount received by it from the sale of sugar and from "all other income," less the charges above mentioned and also less an amount paid as compensation to it, "the buyer," for its services. The provision covering this compensation reads as follows (R. 105):

> * * * as full compensation for the Buyer's services under this agreement, a sum equal to 6% on the capital net worth of the Buyer as shown on its books as of the preceding November 30th.

The final payment from taxpayer to its producer-plantations was to be made on or before December 15th of each year. The amount retained by taxpayer as compensation for its services, over and above its expenses, constituted the fund from which dividends were paid on taxpayer's capital stock. However, neither the petitions showed nor the exhibits contained any provision

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requiring taxpayer to distribute any part of its "compensation" to its stockholders. (R. 105.)

The Tax Court further found that taxpayer had not averred that during the tax years the amount, which it retained, was either more or less than the 6% provided in the contracts, and that taxpayer did not contend that the contracts attached to the petitions represented any unusual method of operations applied only during the processing tax years involved. (R. 106.)

The Tax Court also found that the processing taxes involved were shifted by taxpayer to its stockholder-producers *in their capacity as producers and not in their capacity as stockholders;* that the fact that the equitable owners of the stock and the producers were the same corporate individuals did not obliterate the further circumstance that these corporate individuals, as producers, occupy a different relationship to taxpayer than that occupied in their capacity as stockholders; and that the burden was assumed by the producers, not in proportion to their stockholdings, nor even in proportion to the respective amounts of the taxable commodity furnished (in the case of raw sugar), or used (in the case of jute bags), but in proportion to the raw sugar sold by the producer to taxpayer, regardless of what amount of the raw sugar was ever actually processed or actually sold in bags or in bulk. (R. 107.) Accordingly, the Tax Court concluded that

taxpayer's decision to distribute the burden of these processing taxes back to its producers precludes it from recovering here (R. 108), and sustained the motions to dismiss the proceedings in both cases (R. 109).

The court below reversed, set aside the orders dismissing the petitions and remanded the cases to the Tax Court, for its further consideration and decision on the claimed rights to refunds. (R. 137.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that if taxpayer-processor has not borne the burden of the tax or has transferred it to another person, the right to sue for refund is given to the persons who actually bore the burden of the tax, within the meaning of Title VII of the Revenue Act of 1936 and the governing Treasury Regulations.

2. In holding that, within the meaning of the Revenue Act of 1936 and the governing Treasury Regulations, the relationship of taxpayer and its producer-members is that of a trust, with taxpayer as trustee and the members as beneficiaries, and that deduction of the processing taxes from the sums paid to the producer-members by taxpayer for sugar furnished and jute used was not the shifting of the burden of these taxes through reduction of the price paid by taxpayer for the commodity nor in any other manner.

3. In holding that the Tax Court erred in ruling that taxpayer was relieved of the burden of the processing taxes by virtue of its contracts with its members.

4. In failing to hold that taxpayer did not bear the burden of the processing taxes, for which it here seeks refund, but had shifted that burden to the producers, within the meaning of the controlling statute and Regulations.

5. In holding, in effect, that under the controlling statutes and Regulations, Congress intended to confer the additional privilege upon taxpayer as a processor corporation operating on a cooperative basis to obtain refund even though it had shifted the burden of the processing tax from itself to the producer-members, while denying that privilege to all other corporations.

6. In holding that taxpayer's refund claims were sufficient to permit recovery on a theory of fiduciary relationship between it and its producer-members, within the meaning of the controlling statute and Regulations.

7. In failing to hold that the claim for refund of the processing taxes paid on jute involved in case No. 456 was insufficient to permit recovery within the meaning of the controlling statute and Regulations.

8. In reversing the decision of the Tax Court.

REASONS FOR GRANTING THE WRITS

In these cases involving approximately $8,000,000 in claims against the United States, the court below, in reviewing the decisions of the Tax Court, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Moreover, its decision conflicts in principle with decisions by this Court and by other Circuit Courts of Appeals and presents questions of importance in the administration of the tax laws.

1. The court below clearly erred in holding that (R. 132–133):

> Congress in discharging the moral obligation to refund the illegal collection permitted suits against the sovereign by the processor who paid it if the processor is one who in legal contemplation bore the burden of the tax. *If, however, the processor has not had the burden of the tax or has transferred it to another person or persons, the right to sue the sovereign is given to the persons upon whom the burden was actually inflicted.* [Italics supplied.]

This ruling, it is submitted, plainly constitutes an incorrect construction of the controlling statute, Revenue Act of 1936, c. 690, 49 Stat. 1648, Title VII, Sections 901 to 917, inclusive, which, it has been repeatedly held, authorizes refund suit (a) only by the processor (for upon

the processor alone had the illegal tax been imposed); (b) limits recovery to the amount of tax paid by the processor; and (c), even further, to such part of that amount, as to which the processor actually bore the burden.

The processing taxes involved were imposed and paid pursuant to the Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended, upon the first domestic processing of sugar and jute fabric. This statute specified that (Section 9 (a))—

> * * * The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. * * *

However, the taxing provisions of the Act were held unconstitutional in *United States* v. *Butler*, 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110. Thereafter, Congress enacted the statute here controlling wherein Congress consented, under certain explicitly limited conditions, to permit suits for refund of the illegal tax collections. Suable only by its consent, the United States may place conditions and limitations upon that consent, and such conditions call for strict compliance. *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293; *Lindner Packing & P. Co.* v. *Commissioner*, 118 F. 2d 656 (C. C. A. 10th); *Upchurch Packing Co.* v. *United States*, 151 F.

2d 983, 985 (C. C. A. 5th), certiorari denied, 327 U. S. 803. Thus, the controlling statute explicitly limits refund to "any amount *paid by or collected from any claimant* as tax under the Agricultural Adjustment Act". [Italics supplied.] (Revenue Act of 1936, Section 902, Appendix, *infra*, p. 27.) Similarly, Section 903 provides (Appendix, *infra*, p. 28):

> No refund shall be made or allowed of any amount *paid by or collected from any person* as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed *by such person* in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. * * * [Italics supplied.]

Further the statute provides, by Section 902, so far as pertinent, that this claimant so defined must establish:

> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article proc-

> essed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof: * * *

Treasury Regulations 96, implement the statutory provisions here relevant as follows (Article 204, Appendix, *infra,* p. 36):

> A refund may be *allowed to the person who paid the tax*, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act. [Italics supplied.]

Finally, with specific reference to processing tax refund claims, these Regulations read (Article 604):

> ART. 604. *Refund allowable.*—The total amount of refund allowable, and hence the

> total amount of refund to be claimed, is that part of the total amount of processing tax paid by the claimant with respect to the particular commodity as to which such claimant bore the burden and as to which no refund or credit has been allowed to any person. (See sections 902 and 911 of the Act.)

Hence, contrary to the holding of the court below, no right of recovery is given a person not initially paying the tax, although he may have borne the burden. Taxpayer admittedly was the first domestic processor of the commodities here involved, and it alone was liable for payment or did pay the taxes in question. (No. 455, R. 6; No. 456, R. 6–7.) Cf. *Southwestern Serum Co.* v. *Commissioner,* 108 F. 2d 843 (C. C. A. 10th), certiorari denied, 310 U. S. 628; *Grain Belt Supply Co.* v. *Commissioner,* 109 F. 2d 490 (C. C. A. 8th), certiorari denied, 310 U. S. 648; *Savannah Sugar R. Corp.* v. *Commissioner,* 121 F. 2d 426 (C. C. A. 5th). The court's decision is in conflict with the well established construction that the only person authorized by Title VII of the 1936 Revenue Act to claim and sue for a refund of the invalidated processing tax is the first domestic processor—being the only person liable for the tax and the only person who paid it—and he cannot recover, if he has not borne the burden of the tax. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337; *F. & F. Laboratories* v. *Commissioner,* 104 F. 2d

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563 (C. C. A. 7th); *Oswald Jaeger Baking Co.* v. *Commissioner,* 108 F. 2d 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Zinsmaster Baking Co.* v. *Commissioner,* 109 F. 2d 738 (C. C. A. 8th), certiorari denied, 310 U. S. 653; *Fuhrman & Forster Co.* v. *Commissioner,* 114 F. 2d 863 (C. C. A. 7th), certiorari denied, 312 U. S. 686; *New Consumers Bread Co.* v. *Commissioner,* 115 F. 2d 162 (C. C. A. 3d); *Alexander Smith & Sons C. Co.* v. *Commissioner,* 117 F. 2d 974 (C. C. A. 2d); *Lindner Packing & P. Co.* v. *Commissioner,* 118 F. 2d 656 (C. C. A. 10th); *Savannah Sugar R. Corp.* v. *Commissioner,* 121 F. 2d 426 (C. C. A. 5th); *Upchurch Packing Co.* v. *United States,* 151 F. 2d 983 (C. C. A. 5th), certiorari denied, 327 U. S. 803. As the Fifth Circuit Court of Appeals held, in *Savannah Sugar R. Corp.* v. *Commissioner, supra* (p. 427):

> In construing the Act it has been repeatedly held that suits for the recovery of processing taxes may be maintained against the Government only under such conditions and with such limitations as Congress has prescribed. Therefore, only the person who has actually paid the tax may file a claim for refund and he cannot recover if he has been reimbursed in any way and had not borne the burden of the tax. No right of recovery is given a person not initially paying the tax although he may have borne the burden. Manifestly, it would be im-

> practicable to do so as a person paying the tax may have passed it on to hundreds of others and so many claims might be filed they could not be handled.

This holding conflicts in principle with that of the court below in the instant case. Indeed, the Tax Court relied upon the cited case (R. 108–109), and the only substantial difference between the cited case and the instant case is that taxpayer corporation here operated on a cooperative basis. Since a fundamental issue, involved both here and in the cited case, is whether the taxpayer shifted the burden of the tax, the circumstance that in the cited case taxpayer was not a cooperative would seem to be a difference without a distinction. Nevertheless, the court below clearly, and we believe, erroneously, regarded the circumstance, that taxpayer here operated on a cooperative basis, as governing. (R. 134–135.)

2. Holding that under California law the relationship created by taxpayer's contracts with its member-producers was that of a trust, with the members as settlors creating a trust estate for themselves as beneficiaries, the court below ruled that the Tax Court erred in deciding that the cooperative was relieved of the burden of the processing tax by virtue of its contract with its members. (R. 136–137.) The court below said (R. 137):

> The solution here determined we think is in accord with the Congressional intent. It provides no unjust enrichment to the Cooperative which must return to its members the recovered amount of the illegal tax, if it has not otherwise transferred its burden.

This construction of the relationship between the parties seems to us manifestly incorrect, for the reason which the Tax Court expressed, as follows (R. 107):

> The fact that the equitable owners of the stock and the producers are the same corporate individuals does not obliterate the important fact that these corporate individuals as producers occupy a different relationship to petitioner than that occupied in their capacity as stockholders. The processing taxes involved have been shifted by petitioner to its stockholder-producers in their capacity as producers and not in their capacity as stockholders. The burden was assumed by the producers, not in proportion to their stockholdings, nor even in proportion to the respective amounts of the taxable commodity furnished (in the case of raw sugar), or used (in the case of jute bags); but in proportion to the raw sugar sold by the producer to the petitioner regardless of what amount of that raw sugar was ever actually processed or actually sold in bags or in bulk.

The contracts, under which taxpayer conducted business with its producing plantations, show that the processing taxes were shifted to the producers in their capacity as producers and not in proportion to their stockholdings (R. 33–40, 59–65); before it paid for this raw sugar supplied by the producers taxpayer indisputably deducted the amount of the processing tax from the price (R. 35–36, 61–62, 106–107). The argument of the court below overlooks the fact that taxpayer was doing business with its producer-members as producers or suppliers of raw sugar and under a contract which saved it from bearing the burden of the taxes here involved. If an ordinary business corporation had engaged in business transactions with its stockholders, or with non-stockholders, under a similar contractual arrangement, a court would have had to look at the actual results of the dealings to determine whether the corporation had actually borne the burden of the processing taxes involved; not at the standing of the producers in the corporate set-up. The same must be true of a trust, which did business with any of its income beneficiaries. *The point is that taxpayer shifted its tax burden to these persons in their capacity as producers and not in proportion to their interest as beneficiaries of an alleged trust.* Indeed, in its petition filed with the Tax Court, taxpayer admits that by reason of its cooperative method of doing business the "eco-

nomic effects" of the taxes involved were felt (R. 12)—

> by all the cooperative members of petitioner without distinction as between those who supplied raw sugar which was processed and those who supplied sugar which was sold raw without processing, and without distinction as between those whose raw sugar was processed during the tax period and those whose sugar was processed outside the tax period.

Thus, again, the burden of the processing tax was shifted to the producers, as such, and not in proportion to their alleged interest as "beneficiaries". Section 902 of the 1936 Act prohibits refund if the burden of the tax was shifted "through reduction of the price paid" or "in any manner whatsoever". We have seen that this clearly was recognized by the Tax Court in its opinion. (R. 107.) Hence, it becomes immaterial whether or not the relationship between the parties here is, under the California law, as the court below held, that of trustee and beneficiary. Certainly, taxpayer afforded no indication in its claim for refund that it was claiming it in a fiduciary capacity, and in particular, that it was claiming as trustee on behalf of producers to whom it had passed the burden of the tax.

There is nothing in the 1936 Act or in its legislative history to indicate that Congress contemplated any special treatment for cooperatives. As the Tax Court observed, if Congress had in

fact desired to confer an additional privilege upon cooperatives, while prohibiting the shifting of the processing tax from processors to producers in all other forms of business organization, it would have plainly said so. (R. 108.) Whatever vague analogies may exist between the relationship of a cooperative corporation and its members, on the one hand, and the relationship between trustee and beneficiaries, on the other hand, surely, the construction is strained, which implies that Congress, without more, has here embraced within the category of a "trust", a corporation organized under and by virtue of state corporation laws, even though operating on a cooperative basis. Compare Section 101 (4), (10), (12), (13), of the governing Revenue Act of 1936, which granted income tax exemptions to certain corporations, operating on a cooperative basis (including farmers' and fruit growers' associations), denoting them as "organizations" and under the heading of "Exemptions from tax on corporations." Clearly, the Act did not regard these corporations, even though cooperatives, as trusts. Again, under Section 1001, containing definitions of terms used throughout the statute, it is provided "(2) The term 'corporation' includes associations, joint-stock companies, and insurance companies." Treasury Regulations 94, promulgated under the Revenue Act of 1936, implementing Section 1001, are explicit, as follows:

ART. 1001–1. *Classification of taxables.*—For the purpose of taxation the Act makes its own classification and prescribes its own standards of classification. *Local law is of no importance in this connection.* Thus a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See article 1001–3.) [Italics supplied.]

* * * * *

ART. 1001–3. *Association distinguished from trust.*—The term "trust," as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

* * * *The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust.* * * * [Italics supplied.]

While Treasury Regulations 94 technically deal only with the income tax, nevertheless, the defini-

tions contained in Section 1001 of the governing statute, which these Regulations construe, apply to the entire Act, including Title VII here immediately involved. Moreover, Treasury Regulations 96, which relate particularly to Title VII, define the term "person" as including (Article 101 (e))—

> an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture or other unincorporated organization or group, through or by means of which any business, financial operation, or venture is carried on. It includes a guardian, trustee, executor, administrator, committee, receiver, assignee for the benefit of creditors, conservator or any person acting in a fiduciary capacity.

Thus, in consonance with the foregoing, Regulations 96 also indicate the Treasury understanding that a "corporation", a "trust", and a "person acting in a fiduciary capacity" constitute distinct legal entities, and contradict the holding of the court below that a corporation doing business on a cooperative basis is not to be regarded as a "corporation", but is included within the meaning of a "trust" or a "person acting in a fiduciary capacity".

3. As already noted, taxpayer's refund claims were made on the basis that the amounts paid as processing tax represented the taxpayer's own

liability as a processor—not its liability as a fiduciary. For that reason the Government contended in the court below that taxpayer's refund claims were insufficient to permit recovery on any theory of fiduciary relationship between it and its producer members. The Circuit Court of Appeals, however, disagreed. It held that because the taxpayer attached to its claims copies of its contracts with its producer-members "into which is imported the laws of California" the claims were sufficient in this respect. (R. 137.) Such a ruling seems to conflict with the principle of *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293, and numerous Circuit Court of Appeals cases involving the sufficiency of refund claims under Title VII of the 1936 Act, including the Ninth Circuit's own decision in *Vica Co.* v. *Commissioner,* 159 F. 2d 148, certiorari denied, 331 U. S. 833. Other such conflicting cases are: *Lee Wilson & Co.* v. *Commissioner,* 111 F. 2d 313 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. 2d 452 (C. C. A. 6th); *Landrum* v. *Commissioner,* 122 F. 2d 857 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th); *Samara* v. *United States,* 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686; *Cherokee Textile Mills* v. *Commissioner,* 160 F. 2d 685 (C. C. A. 6th). Indeed, the pertinent Treasury Regulations 96, Article 209, further indicate that a claim by a fiduciary must disclose

the claimant's fiduciary capacity.[5] In this respect the decision below is also contrary to the decisions involving sufficiency of claims under the general provisions of the taxing statutes. *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *United States* v. *Standard Oil Co.*, 158 F. 2d 126 (C. C. A. 6th), certiorari denied, 331 U. S. 836.

(4) Before the Circuit Court of Appeals, the Government also contended that the claim for refund of the jute processing taxes was insufficient to give the Tax Court jurisdiction under *Angelus Milling Co.* v. *Commissioner, supra,* since this claim (No. 456, R. 14–26) contained none of the information required by the statute and the Regulations, except the dates and amounts of the taxes and the amounts of refunds and credits (No. 456, R. 15–16). However, the Circuit Court of Appeals failed specifically to pass upon this contention, perhaps leaving it to the Tax Court on remand.

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[5] ART. 209. *Claim by fiduciary.*—* * * If the tax was paid by an executor, administrator, guardian, trustee, receiver, or other fiduciary, and the claim for refund is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made in the claim showing that the tax was paid by the fiduciary and that the latter is still acting. * * * If a claim is filed by a fiduciary other than the one by whom the tax was paid, documentary evidence showing the authority of the fiduciary to make the claim shall accompany the claim.

It is in the public interest that this Court should resolve these questions at the present stage of the proceedings, rather than await the result of a second hearing before the Tax Court on the remand to that tribunal directed by the court below. It is probable that upon remand the only issue before the Tax Court will be whether the tax was shifted to the taxpayer's vendees, and, if so, in what amount. In a case of this complexity such hearings undoubtedly must involve the expenditure of much time and money by all parties concerned. Moreover, in the meantime, large amounts of interest will be accumulating against the Government. In addition to the large amount of public money involved, the case presents questions of importance in the administration of the tax laws, which should be decided with a minimum of delay. Thus, it is to the advantage of all concerned, and particularly in the public interest, that the case be now considered by this Court.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER, 1947.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII. REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed. (7 U. S. C. 1940 ed., Sec. 623.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect

to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof: or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., 1940 ed., Sec. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862].

FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment

Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 1940 ed., Sec. 645.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or

(b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sales prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or his records for any part of such period are so inadequate as not to provide satisfactory data on prices

paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the

burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them:

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was

paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. 1940 ed., Sec. 649.)

Revenue Act of 1942, c. 619, 56 Stat. 798:[1]

SEC. 510. ABOLITION OF BOARD OF REVIEW AND TRANSFER OF JURISDICTION TO BOARD OF TAX APPEALS.

(a) Effective as of the close of business on December 31, 1942, the Board of Review, established under section 906 (b) of the Revenue Act of 1936, is hereby abolished and the jurisdiction vested in said Board of Review is hereby transferred to and vested in the Board of Tax Appeals.

* * * * *

(c) All proceedings pending in the said Board of Review on December 31, 1942,

[1] The name of the Board of Tax Appeals was changed by Section 504 of the Revenue Act of 1942 to The Tax Court of the United States.

shall be deemed pending in and be transferred forthwith to the Board of Tax Appeals, and shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein.

(d) All journals, dockets, books, files, records, and property, including office equipment of the said Board of Review, shall be transferred to the Board of Tax Appeals.

(e) Section 902 of the Revenue Act of 1936 (relating to conditions on allowance of refunds) is amended by striking out "Board of Review" and inserting in lieu thereof "Board of Tax Appeals (hereinafter referred to as the 'Board')".

* * * * *

(7 U. S. C. 1940 ed., Supp. V, Sec. 648.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

* * * * *

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable.*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

* * * * *

ART. 601. *Claim form prescribed.*—Claims for refund of amounts paid as

processing tax (as defined in section 913 (b) of the Act) shall be filed on P. T. Form 79. (See Chapter II of these regulations for general provisions relating to all claims.)

ART. 603. *Payment of tax.*—The claimant shall set forth in the claim complete data with respect to the amount of processing tax which he has paid on the processing of the commodity. Each claim shall show as to each month's processing of the commodity: (1) the total tax liability returned; (2) the total amount of tax paid on the first domestic processing of the commodity; (3) the date and amount of each payment and the month for which paid; (4) that part of the total amount paid which represented the processing of the commodity for a customer for a charge or fee ("custom processing tax," see Chapter V of these regulations); (5) that part of the total amount paid which represented processing tax, as defined in section 913 (b) of the Act; and (6) the collector to whom each payment was made. In the case of tobacco the above data respecting tax payment shall be shown separately with respect to each market classification.

* * * * *

ART. 605. *Evidence as to margins.*—Section 907 of the Act provides that in claims for refund of amounts paid as processing tax it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period

than the average margin per unit of such commodity was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

There shall be submitted with, and as a part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax. (For definition of "tax period" and "period before and after the tax," see section 907 (c) of the Act.)

The average margin for the tax period shall be computed as follows: Determine for each month during the period (1) the gross sales value of articles derived from the commodity processed during such month; (2) the cost of the commodity processed during such month; (3) the amount of processing tax paid with respect to the quantity of the commodity processed during the month; and (4) the number of units of the commodity processed during the month. The sum of the monthly gross sales values for all months during the period minus the sum of the monthly costs of the commodity processed for all months during the period, minus the sum of the processing taxes paid for all months during the period, and divided by the sum of the number of units of the commodity processed during all the months comprising the period is the average margin for such period. (For definition of "cost of commodity" and "gross sales

value," see section 907 (b), paragraphs (5) and (6), respectively, of the Act.)

The average margin for the period before and after the tax shall be computed in the same manner as the average margin for the tax period, except that the processing tax does not enter into the computation.

In determining the average margin for the tax period, the "number of units of the commodity processed" shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "cost of the commodity processed" shall be the cost of the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "gross sales value of articles" shall be the gross sales value of articles processed from the number of units of the commodity with respect to which the claimant actually paid the processing tax.

In support of such statement there shall be submitted, verified by appropriate affidavit, a detailed showing of the manner in which the margins for each month and the average margins for each period were ascertained, the data and records on which they were based, the location of such data and records, and all other related matters, including the accounting procedure of the claimant, which entered into the computations of such margins. All elements, factors, units, or measures entering into the computation of such margins, and any departure from uniformity in the use thereof in making such computation for any part of either period, must be fully explained and justified.

ART. 606. *Other evidence.*—In addition to the showing as to margins, the claimant is privileged to submit with his claim any other evidence available to him tending to establish that he bore the burden of the tax. Such evidence may be submitted to support the prima facie presumption, if such presumption is in favor of the claimant, or to rebut such presumption if it is against him. (See section 902 and subsection (e) of section 907 of the Act.)

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